

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:11-CR-00115-F-1
No. 4:13-CV-00173-F

KELVIN NALLS,)
Petitioner,)
v.) ORDER
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on Kelvin Nalls' Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE-53]. In Nalls' section 2255 motion, he alleges that he received ineffective assistance of counsel when he requested that his attorney file a timely notice of appeal but later discovered his attorney failed to do so. [DE-53-1] at 2, 3, 7.

In the Memorandum filed in support of the Government's Motion to Dismiss or Motion for Summary Judgment, the Government argues that the court should reject Nalls' claim based on the declaration of Nalls' trial counsel, Mark A. Ward. [DE-58] at 4-5. In Ward's declaration, he states as follows:

Immediately following sentencing, I met with Mr. Nalls in the holding cell interview room at the federal building in Wilmington. At that time, I also explained to Mr. Nalls that he had a right to appeal his sentence and, if he desired to do so, that I would assist him in noting the appeal. Mr. Nalls clearly and unequivocally informed me that he was satisfied with the sentence and did not want to appeal. As is my standard practice, I made a note in my file of our conference and of Mr. Nalls' desire not to appeal his sentence.

[DE-58-1] at 2. Mr. Ward went on to further say that "[a]t no time, during any of the conversations I had with Mr. Nalls, did he ever express a desire to appeal." *Id.* at 3.

Rule 8 of the Rules Governing Section 2255 Proceedings provides that it is within the

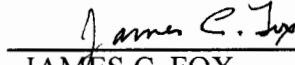
discretion of the district court to determine whether an evidentiary hearing is warranted. The court may decide a section 2255 motion without an evidentiary hearing if “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b).

In this case, the court finds that a credibility issue exists and the Government has not conclusively shown that Nalls is not entitled to relief on his section 2255 motion. For these reasons, the court concludes that an evidentiary hearing is necessary. Accordingly, the Clerk is DIRECTED to schedule an evidentiary hearing in this case.

Pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings, when an evidentiary hearing is warranted, the court must appoint an attorney to represent a moving party who qualifies to have appointed counsel under 18 U.S.C. § 3006A. The Federal Public Defender is DIRECTED to provide representation in this action.

SO ORDERED.

This 18 day of March, 2015.



JAMES C. FOX
SENIOR UNITED STATES DISTRICT JUDGE